Other Remedies for Victims of Sexual Assault

CHAPTER 10

10.1 Chapter Overview 481
10.2 Theories of Recovery 482
A. Actions Against Perpetrators 482
B. Actions Against Third Parties 483
10.3 Defenses to Civil Actions 484
A. Statutes of Limitations for Civil Actions 484
B. General Tolling Provisions and Required Dismissals/Stays For Civil Actions Arising Out of Pending Criminal Charges 488
C. Common-Law Wrongful-Conduct Rule 489
D. Comparative Fault Defense 492
E. The "Impairment" Defense 494
10.4 Evidentiary Issues 496
A. Rape Shield Laws Inapplicable in Civil Actions 496
B. Cross-Examination Regarding Victim's Civil Suit 496
C. Asserting the Privilege Against Self-Incrimination in Civil Suits 496
D. Prohibition Against Use of Evidence From Juvenile Delinquency Proceedings 499
10.5 Damages and Remedies 499
A. Money Damages Recoverable in Civil Actions 499
B. Required Set Off of Compensatory Damages Against Restitution ... 501
C. Liability of Multiple Perpetrators 501
10.6 Concurrent Criminal and Civil Proceedings 502
A. The Outcome of Criminal or Juvenile Proceedings Does Not Bar a Subsequent Civil Action by a Crime Victim 502
B. The Victim's Use of Judgments or Orders From Criminal or Juvenile Proceedings as Evidence in Civil Actions 503
10.7 Crime Victim Services Commission 506
A. Eligibility Requirements 506
B. Maximum Award Limits, Emergency Awards, and Required Set-Offs 506
C. Filing Requirements 507
D. CVSC Investigation Procedures 508

10.1 Chapter Overview

This chapter explores civil and administrative remedies for victims of sexual assault crimes, focusing mainly on civil lawsuits against perpetrators and third parties. Also discussed, in a more limited way, are the administrative remedies available to sexual assault victims through the Crime Victim's Services Commission (CVSC).

> **Note:** Because the effects of sexual assault can impact every facet of a victim's life, other forms of civil legal assistance for the victim may be needed. Such assistance may include help with divorce and child custody, housing, employment, wills and estates, immigration, education, bankruptcy, and emancipation of minors. A detailed discussion of these topics is outside the scope of this Benchbook. For more information on any of these topics, see Zorza, *Civil Needs of*

Sexual Assault Victims, 5 Sexual Assault Report 4, 49, 60-61 (March/April 2002).

10.2 Theories of Recovery

*See Kelegian, *The Benefits of Civil Action for Sexual Assault Survivors*, 5 Sexual Assault Report 3, 33 (January/February 2002).

Although criminal prosecution may hold perpetrators accountable, deter them (and others) from committing future crimes, and provide victims with restitution, a civil action may better compensate the victim for the immediate and long-term physical and psychological injuries caused by the perpetrator's actions.* The following subsections discuss various types of civil actions that may be filed by a sexual assault victim against a perpetrator or a third party.

Note: On the advantages and disadvantages of civil suits from a victim's perspective, see Kelegian, *The Benefits of Civil Action for Sexual Assault Survivors*, 5 Sexual Assault Report 3 (January/February 2002), p 33, 44-48; Manley, Comment, *Civil Compensation for the Victim of Rape*, 7 Cooley L Rev 193 (1990), p 199-201; Casarino, Note, *Civil Remedies in Acquaintance Rape Cases*, 6 BU Pub Int LJ 185 (1996), p 197-198; and *A Guide to Civil Lawsuits: Practical Considerations for Survivors of Rape and Childhood Sexual Abuse* (Washington Coalition of Sexual Assault Programs, 2001), p 4.

A. Actions Against Perpetrators

A civil action filed against a sexual assault perpetrator is generally an intentional tort. A "tort" is a breach of a noncontractual duty owed to the plaintiff, the source of which may be a statute or the common law. *Overby v Johnson*, 418 F Supp 471, 472-473 (ED Mich, 1976). Examples of causes of action against the perpetrator include:

- Assault, see M Civ JI 115.01 and *Totten v Totten*, 172 Mich 565, 574 (1912) (a civil action of assault and battery does not distinguish between a simple assault and battery and a sexual assault and battery).
- Battery, see M Civ JI 115.02 and *Totten*, *supra* (a civil action of assault and battery does not distinguish between a simple assault and battery and a sexual assault and battery).
- False imprisonment, see M Civ JI 116.21.
- Intentional infliction of emotional distress, *Atkinson v Farley*, 171 Mich App 784, 788 (1988).
- Negligent infliction of emotional distress, *Duran v The Detroit News, Inc*, 200 Mich App 622, 629 (1993) (available only when a plaintiff witnesses negligent injury to a third party and, as a result, suffers mental disturbance).
- Invasion of privacy, *Lewis v Dayton-Hudson Corp*, 128 Mich App 165, 168 (1983), which may include one of the following: (1) intrusion upon plaintiff's seclusion or solitude; (2) public disclosure of embarrassing private facts about the plaintiff; (3) publicity that places the plaintiff in a false light in the public eye; and (4) appropriation of the plaintiff's name or likeness to the advantage of the defendant.

- Libel and slander, see M Civ JI 118.05.
- Violation of stalking or aggravated stalking statutes, MCL 600.2954.*
- Negligent transmission of sexually transmitted disease, *Doe v Johnson*, 817 F Supp 1382, 1393 (WD Mich, 1993).
- Wrongful death, MCL 600.2922 et seq.

> **Note:** A sexual assault victim was previously able to seek a civil remedy for a "crime of violence motivated by gender" in federal or state court under the Violence Against Women Act. 42 USC 13981(b) and (e)(3). However, on May 15, 2000, the United States Supreme Court, in *United States v Morrison*, 529 US 598, 627 (2000), struck down the civil remedy provision in 42 USC 13981(b) as an unconstitutional extension of Congress' power under the U.S. Constitution's Commerce Clause and § 5 of the 14th Amendment to enact such legislation.

*For a detailed discussion of this civil action, see Lovik, *Domestic Violence Benchbook: A Guide to Civil & Criminal Proceedings* (MJI, 2d ed, 2001), Section 3.14(A).

B. Actions Against Third Parties

A civil action filed against a third party based on a sexual assault is generally a negligence action. A plaintiff in a negligence action must establish four elements: (1) that a legal duty was owed by the defendant to the plaintiff; (2) that there was a breach of that duty; (3) that the plaintiff suffered damages; and (4) that the defendant's breach was the proximate cause of the damages suffered. *Terry v City of Detroit*, 226 Mich App 418, 424 (1997). Examples of causes of action against third parties include the following:

- Premises liability
  - A landlord's negligent failure to provide adequate security, *Johnston v Harris*, 387 Mich 569, 572-573 (1972); and *Samson v Saginaw Professional Building, Inc*, 393 Mich 393, 402 (1975).
  - A merchant's negligent failure to expedite police involvement in situations that pose a risk of imminent and foreseeable harm, *Williams v Cunningham Drug Stores, Inc*, 429 Mich 495, 499 (1988); *Scott v Harper Recreation*, 444 Mich 441, 452 (1993); *MacDonald v PKT, Inc*, 464 Mich 322, 345-346 (2001); and *Diomedi v Total Petroleum, Inc*, 181 Mich App 789, 792-793 (1989).
  - A merchant's negligent failure to control unruly patrons and to eject them from the premises, *Mills v White Castle System, Inc*, 167 Mich App 202, 203-204 (1988), lv den 431 Mich 880 (1988).
- "Dramshop actions" (suits against retailers of alcoholic beverages that unlawfully serve intoxicated persons or minors, resulting in injury, death, or property damage), MCL 436.1801(3)-(11).
- Parents' negligent failure to supervise their children under the common-law, *Zapalski v Benton*, 178 Mich App 398, 403 (1989).

- Parents' vicarious and strict liability for actions of their unemancipated children who cause bodily harm or injury to another or who have willfully or maliciously destroyed real or personal property, up to $2,500.00 in damage, MCL 600.2913.*

*For purposes of obtaining relief under MCL 600.2913, a crime victim must, upon request, be given a certified copy of an order of an adjudicative hearing. MCL 780.799.

- "Quid pro quo" or "hostile work environment" sex discrimination against a defendant's employer under the Elliott-Larsen Civil Rights Act, MCL 37.2101 et seq. "Quid pro quo harassment is that which requires that the employee either accede to sexual demands or forfeit job benefits and perks or otherwise be subject to less favorable working conditions. . . . Hostile work environment harassment is unwelcome sexual conduct in the workplace that unreasonably interferes with an employee's work performance or creates an intimidating, hostile, or offensive employment environment." *McCallum v Department of Corrections*, 197 Mich App 589, 596 (1992). Regarding "quid pro quo," see *Champion v Nation Wide Security*, 450 Mich 702, 708, 713-714 (1996) ("[W]e hold an employer strictly liable where the supervisor accomplishes the rape through the exercise of his supervisory power over the victim.") Regarding "hostile work environment," see *Radtke v Everett*, 442 Mich 368, 395 (1993) ("Although rare, single incidents *may* create a hostile environment—rape and violent sexual assault are two possible scenarios. One such extremely traumatic experience may, therefore, fulfill the statutory requirement.") [Emphasis in original.] For the elements of "quid pro quo" and "hostile work environment" claims, see *Chambers v Trettco*, Inc, 463 Mich 297, 310-311 (2000).

10.3 Defenses to Civil Actions

The following subsections explore various defenses that may be interposed in civil actions filed by sexual assault victims against perpetrators and third parties. These defenses include:

- Statutes of limitations.
- Common-law wrongful misconduct rule.
- Comparative fault.
- Intoxication.

A. Statutes of Limitations for Civil Actions

1. Limitations Periods

The following tort claims must be filed within the designated limitations periods:*

*For discussion of criminal statute of limitations periods, see Section 4.12.

- Assault—two years for non-domestic cases, MCL 600.5805(2).
- Battery—two years for non-domestic cases, MCL 600.5805(2).
- Assault or battery of a domestic partner where the plaintiff is (1) the defendant's spouse or former spouse; (2) a person with whom the

defendant has a child in common; or (3) a person with whom the defendant resides or has formerly resided—five years, MCL 600.5805(3). This limitation applies to causes of action arising on or after February 17, 2000, and to causes of action for which the limitation period for non-domestic cases in MCL 600.5805(2) (assault or battery) had not expired as of February 17, 2000.

- Injury to person or property of a domestic partner where the plaintiff is (1) the defendant's spouse or former spouse; (2) a person with whom the defendant has a child in common; or (3) a person with whom the defendant resides or has formerly resided—five years, MCL 600.5805(10). This limitation applies to causes of action arising on or after February 17, 2000, and to causes of action for which the limitation period in MCL 600.5805(9) (death or injury to person or property) had not expired as of February 17, 2000.

- False imprisonment—two years, MCL 600.5805(2).

- Libel or slander—one year, MCL 600.5805(8).

- Employment sex discrimination or harassment—three years, MCL 600.5805(9). See *Slayton v Michigan Host, Inc*, 144 Mich App 535, 553 (1985) (the three-year period of limitations for injuries to a person in MCL 600.5805(7) [currently MCL 600.5805(9)] is applicable to an employee alleging discrimination in employment practices).

- Dramshop actions—two years after the death or injury, MCL 436.1801(4).

- Wrongful death—limitation period is governed by the statutory provision applicable to the underlying theory of liability (e.g., two years if the death resulted from a battery; three years if the death resulted from negligence), *Hardy v Maxheimer*, 429 Mich 422, 427 (1987).

- "The period of limitations is 3 years after the time of the death or injury for all other actions to recover damages for the death of a person, or for injury to a person or property." MCL 600.5805(9). This limitations period applies to actions other than those specifically listed in MCL 600.5805, such as intentional infliction of emotional distress and negligence.

- All other personal actions not expressly covered by statute or common law—6 years, MCL 600.5813.

2. Commencement of Limitations Period and the "Discovery Rule"

The limitations period begins to run when "the claim first accrued to the plaintiff or to someone through whom the plaintiff claims." MCL 600.5805(1). Unless a statute provides otherwise, a claim accrues "at the time the wrong upon which the claim is based was done regardless of the time when damage results." MCL 600.5827. Accrual of a claim is not delayed because the claimant is unaware of the identity of the alleged tortfeasor. See *Fazzalare v Desa Industries, Inc*, 135 Mich App 1, 6 (1984) (filing a "John Doe" complaint does not interrupt the running of the applicable limitations

period). But see MCL 600.5855, regarding the tolling of limitations periods in cases of fraudulent concealment of a claim or identity of a liable person.

Under the common-law "discovery rule," a plaintiff's tort claim does not accrue until he or she discovers, or should have discovered through the exercise of reasonable diligence, an injury and a causal connection between the injury and defendant's misconduct. *Moll v Abbott Laboratories*, 444 Mich 1, 16 (1993). Application of the "discovery rule" is appropriate where the alleged injury is latent, or where there is a verifiable basis for the plaintiff's inability to discover the connection between the alleged injury and the defendant's misconduct. See *Nelson v Ho*, 222 Mich App 74, 86 (1997) (assuming without deciding that the "discovery rule" applies to actions alleging intentional infliction of emotional distress).

3. "Statutory Grace Periods" (Insanity, Minority, Death)

Under the "statutory grace period" rule, a person suffering a disability, i.e., a person who is insane or under age 18 at the time a claim accrues, has one year after the disability ceases to commence an action. MCL 600.5851(1). "Insane" means "a condition of mental derangement such as to prevent the sufferer from comprehending rights he or she is otherwise bound to know and is not dependent on whether or not the person has been judicially declared to be insane." MCL 600.5851(2).

In addition, if a person dies before or within 30 days after the applicable limitations period has run, actions that survive by law may be filed by the deceased's personal representative within three years after the limitations period has run. MCL 600.5852.

4. "Repressed Memory"

*For a discussion of "repressed memory" generally, and its relation to the "discovery rule," see Brown, Scheflin & Hammond, *Memory, Trauma Treatment, and the Law* (New York: W.W. Norton Co, 1998).

A sexual assault victim may allege a "repressed memory"* as a reason for not filing a civil suit within the limitations period, or as a way to toll or extend the limitations period. However, neither the Michigan Supreme Court nor the Court of Appeals have upheld such claims. Instead, both courts have analyzed the claims under the "discovery rule" and statutory grace period, discussed above.

In *Lemmerman v Fealk*, 449 Mich 56, 61-63 (1995), the plaintiffs in two consolidated cases filed tort suits alleging that they had been sexually abused as children 40 to 50 years before filing their lawsuits—one from age three to ten; the other from age five throughout adolescence. They also alleged that they had repressed memories of the assaults as a way of coping with the psychological harm caused by the abuse, until their memories were later revived by therapy. In response to defense motions for summary disposition, the plaintiffs argued that the limitations period should be extended by the "discovery rule" or the insanity statutory grace period. *Lemmerman, supra* at 64-65. Emphasizing a court's inability to verify such claims, the Court in *Lemmerman* held that neither the "discovery rule" nor the statutory grace

period for persons suffering from insanity "extends the limitation period for tort actions allegedly delayed because of repression of memory of the assaults underlying the claims." *Lemmerman, supra* at 76-77. Importantly, the Court further held that neither of these devices is sufficient to toll the limitations period, "even upon presentation of allegedly 'objective and verifiable evidence' of a plaintiff's claim." *Id.* at 77.

In *Lemmerman*, *supra* at 77, the Michigan Supreme Court, in footnote 15, stated the following:

> "We do not address the result of those repressed memory cases wherein long-delayed tort actions based on sexual assaults were allowed to survive summary disposition because of the defendants' admissions of sexual contact with the plaintiffs when they were minors. *Meiers-Post [v Schafer*, 170 Mich App 174; 427 NW2d 606 (1988)]; *Nicolette v Carey*, 751 F Supp 695 (WD Mich, 1990). *Such express and unequivocal admissions take these cases outside the arena of stale, unverifiable claims with which we are concerned in the present cases*."* [Emphasis added.]

*The plaintiff in *Lemmerman* confronted her father, the alleged perpetrator, before he died, telling him he did something very bad to her when she was younger. In response, he stated "I'm sorry. I loved you very much. You were so beautiful and intelligent." *Lemmerman*, *supra* at 546. It is unclear if the other alleged perpetrator in the consolidated case made any admissions or confessions.

After the Michigan Supreme Court decided *Lemmerman*, two Michigan Court of Appeals decisions addressed whether there was an exception to the rule set forth in *Lemmerman* if the defendant made express, unequivocal admissions of the charged sexual misconduct. In *Guerra v Garratt*, 222 Mich App 285, 292 (1997), the Court of Appeals held that the footnote quoted above created no admission-based exception to the general holding of *Lemmerman*; instead, the Court found that the footnote addressed only the retroactive application of *Lemmerman* to cases filed before the opinion was issued. The Court in *Guerra* reasoned that if the Supreme Court in *Lemmerman* had meant to create an exception to its holding, the Court would have done so in the body of its opinion rather than in a footnote. Thus, even though a defendant in *Guerra* admitted to sexual contact with the plaintiff, such an admission was insufficient to toll or extend the limitations period for a tort action delayed by repressed memories of the misconduct. *Guerra*, *supra* at 290.

In *Demeyer v Archdiocese of Detroit (On Remand, On Rehearing)*, 233 Mich App 409, 411-412 (1999), another Court of Appeals panel held that although it disagreed with the prior holding in *Guerra*, it was required to follow that holding by MCR 7.215(H)(1).* Were it not constrained to follow *Guerra*, the Court in *Demeyer* would have held "that repressed memory cases supported by admissions may fall outside *Lemmerman*" if the claims are verifiable. *Demeyer*, *supra* at 418. The Michigan Supreme Court denied leave to appeal in *Demeyer*. *Demeyer v Archdiocese of Detroit*, 461 Mich 1004 (2000). However, see Chief Justice Weaver's concurring opinion, which stated that because the defendant's admission of massaging the plaintiff was not an express, unequivocal admission of sexual conduct, the Supreme Court could not consider whether an exception to the general rule set forth in *Lemmerman* should be instituted.

*See current MCR 7.215(I)(1), which requires Court of Appeals' panels to follow rules set forth in prior decisions of the Court on or after November 1, 1990, if they have not been reversed or modified by the Supreme Court or by a special "conflict resolution panel" of the Court.

B. General Tolling Provisions and Required Dismissals/Stays For Civil Actions Arising Out of Pending Criminal Charges

1. General Tolling Provisions

A general tolling provision for personal injury and wrongful death actions that arise out of pending criminal charges is contained in MCL 600.2955b(4). That statute provides:

> "The period of limitations to bring a civil action for damages for an individual's bodily injury or death is tolled during each period of time that a court proceeding is pending regarding the individual in a criminal action or an adjudication under [MCL 712A.1 to 712A.32 of the Juvenile Code], including appeals, but only if the civil action is based on the same events as the criminal action or adjudication."

This tolling provision does *not* apply to pending criminal sexual conduct cases if MCL 600.1902 [governing prohibition of civil suits initiated by criminal sexual conduct defendants] applies. MCL 600.2955b(5).

2. Prohibition of Civil Suit Against Criminal Sexual Conduct Victim During Criminal Case

MCL 600.1902(2) prohibits a defendant charged with criminal sexual conduct in any degree, or with assault with intent to commit criminal sexual conduct, from commencing or maintaining a civil action against the victim during the pendency of the criminal case if both of the following are true:

> "(a) The criminal action is pending in a trial court of this state, of another state, or of the United States.
>
> "(b) The civil action is based upon statements or reports made by the victim that pertain to an incident from which the criminal action is derived." MCL 600.1902(2)(a)-(b).

If a defendant files a civil suit in violation of this provision, the court must dismiss the action without prejudice. MCL 600.1902(3). In such cases, the limitations period for bringing a civil action described in MCL 600.1902(2) "is tolled for the period of time during which the criminal action is pending in a trial court of this state, of another state, or of the United States." MCL 600.1902(4). However, the prohibition in MCL 600.1902 does not apply "if the victim files a civil action based upon an incident from which the criminal action is derived against the defendant in the criminal action." MCL 600.1902(5). The definition of "victim" includes the parent, guardian, or custodian of a person less than 18 years old or of a mentally incapacitated person. MCL 600.1902(1)(b)-(c).

> **Note:** For a description of cases that gave rise to the passage of MCL 600.1902, see Manley, Comment, *Civil Compensation For The Victim of Rape*, 7 T M Cooley L R 193, 197 (1991); and *Rosenboom v Vanek*, 182 Mich App 113 (1989).

3. Required Dismissals/Stays of Civil Actions Involving Criminal Activity

Except as provided below, MCL 600.2955b(1) requires a court to *dismiss with prejudice* a plaintiff's civil action for bodily injury or death if the individual's bodily injury or death occurred during one or more of the following:*

*MCL 600.2955b(1) also requires the court to order the plaintiff to pay each defendant's costs and actual attorney fees.

- The individual's commission, or flight from the commission, of a felony.
- The individual's acts or flight from acts that the finder of fact in the civil action finds, by clear and convincing evidence, to constitute all the elements of a felony.

However, under MCL 600.2955b(2), if the bodily injury or death described above resulted from force, the court shall not apply MCL 600.2955b(1) to a plaintiff's claim against a defendant who caused the individual's bodily injury or death, unless the court finds that the defendant did either of the following regarding force:

- Used a degree of force that a reasonable person would believe to have been appropriate to prevent injury to the defendant or others; or
- Used a degree of force that a reasonable person would believe to have been appropriate to prevent or respond to the commission of a felony. The court must not consider the fact that defendant may not have known that plaintiff's actions would be the commission of a felony.

Alternatively, under MCL 600.2955b(3), a court shall *stay* a plaintiff's civil action for bodily injury if a proceeding is pending regarding the plaintiff's commission of a felony until the final disposition of the proceeding on the individual's commission of a felony, including appeals, but only if both of the following occur:

- The defendant moves under MCL 600.2955b(1) [governing required dismissals of civil actions when victim involved with commission of felony] to dismiss the plaintiff's claim in regard to the defendant.
- The court finds probable cause to believe that MCL 600.2955b(1) [governing required dismissals of civil actions when victim involved with commission of felony] applies to the plaintiff's claim against defendant.

The rules provided in MCL 600.2955b do not apply if at any time MCL 600.1902 [governing prohibition of civil suits initiated by CSC defendants] applies.* MCL 600.2955b(5).

*See Section 10.3(B)(2) for discussion of MCL 600.1902's tolling provisions.

C. Common-Law Wrongful-Conduct Rule

Because a civil suit may involve allegations that the plaintiff committed an illegal or immoral act—i.e., engaging in an adulterous affair or prostitution—it is important to consider the common-law wrongful-conduct rule.

1. The General Rule

In Michigan, the common-law wrongful-conduct rule bars civil actions that are based in whole or in part upon an illegal or immoral act committed by the plaintiff.* The rationale underlying the rule is that "courts should not lend their aid to a plaintiff who founded his cause of action on his own illegal conduct." *Orzel v Scott Drug Co*, 449 Mich 550, 559 (1995). In *Orzel*, the Michigan Supreme Court, after summarizing long-standing Michigan precedents applying the wrongful-conduct rule, explained the rule as comprising two common-law maxims:

> "When a plaintiff's action is based, in whole or in part, on his own illegal conduct, a fundamental common-law maxim generally applies to bar the plaintiff's claim:
>
> > '[A] person cannot maintain an action if, in order to establish his cause of action, he must rely, in whole or in part, on an illegal or immoral act or transaction to which he is a party.'
>
> "When a plaintiff's action is based on his own illegal conduct, and the defendant has participated equally in the illegal activity, a similar common-law maxim, known as the 'doctrine of in pari delicto' generally applies to also bar the plaintiff's claim:
>
> > '[A]s between parties in pari delicto, that is equally in the wrong, the law will not lend itself to afford relief against the other, but will leave them as it finds them.'" [Citations omitted.] *Id*. at 558.

Regarding the nature of a plaintiff's misconduct, the Supreme Court in *Orzel* further explained:

> "The mere fact that a plaintiff engaged in illegal conduct at the time of his injury does not mean that his claim is automatically barred under the wrongful-conduct rule. To implicate the wrongful-conduct rule, the plaintiff's conduct must be prohibited or almost entirely prohibited under a penal or criminal statute. . . . In contrast, where the plaintiff's illegal act only amounts to a violation of a safety statute, such as traffic and speed laws or requirements for a safe workplace, the plaintiff's act, while illegal, does not rise to the level of serious misconduct sufficient to bar a cause of action by application of the wrongful-conduct rule." *Id*. at 561.
>
> **Note:** In *Poch v Anderson*, 229 Mich App 40, 50 (1998), the Court of Appeals held that plaintiff's violation of MCL 436.33(1),* a 60-day/$1,000.00 misdemeanor prohibiting selling or furnishing alcohol to a minor, was merely a violation of a safety statute and thus did not, under the wrongful-conduct rule, bar his negligence action against the minor defendant for causing an automobile accident. See also *Pantely v Garris, Garris & Garris, PC*, 180 Mich App 768, 778 (1989) (plaintiff's violation of perjury criminal statute in divorce case held sufficient to bar legal malpractice action against attorney who allegedly counseled her to commit perjury).

Additionally, a sufficient causal nexus must exist between the plaintiff's wrongful conduct and the asserted damages. *Orzel*, *supra* at 564. A causal

*For a case involving the comparison of the wrongful-conduct rule, which bars claims, and Michigan's comparative negligence doctrine, which reduces the amount of a plaintiff's recovery in proportion to the degree of fault, see *Poch v Anderson*, 229 Mich App 40, 48-51 (1998).

*MCL 436.33(1) was repealed and replaced by MCL 436.1701(1). 1998 PA 58.

nexus will be sufficient if it is more than "incidentally" or "collaterally" connected to the cause of action. The Supreme Court in *Orzel* stated:

> "An action may be maintained where the illegal or immoral act or transaction to which plaintiff is a party is merely incidentally or collaterally connected with the cause of action, and plaintiff can establish his cause of action without showing or having to rely upon such act or transaction although the act or transaction may be important as explanatory of other facts in the case." *Id*., quoting 1A CJS, Actions, § 30, p 388-389.

2. Exceptions to the Rule

One exception to the wrongful-conduct rule, known as the "culpability exception," provides that a civil action will not be barred if the defendant's culpability is greater than the plaintiff's. The Supreme Court in *Orzel* explained this exception as follows:

> "An exception to the wrongful-conduct rule may apply where both the plaintiff and defendant have engaged in illegal conduct, but the parties do not stand in pari delicti. In other words, even though a plaintiff has engaged in serious illegal conduct and the illegal conduct has proximately caused the plaintiff's injuries, a plaintiff may still seek recovery against the defendant if the defendant's culpability is greater than the plaintiff's culpability for the injuries, *such as where the plaintiff has acted '"under circumstances of oppression, imposition, hardship, undue influence, or great inequality of condition or age*.'" *Id*. at 569. [Emphasis added.]

The Court of Appeals has construed the foregoing language as requiring a defendant's culpability to be "significantly" greater than the plaintiff's. In *Stopera v DiMarco*, 218 Mich App 565, 571 n 5 (1996), the Court of Appeals applied the "culpability exception" to reinstate plaintiff's negligence action to recover damages for contracting human papillomavirus (HPV), i.e., genital warts, which were contracted during an adulterous affair with defendant, a married man, who was aware that he had genital warts before repeatedly engaging in sexual intercourse with plaintiff. The Court found that even though both parties engaged in illegal adulterous activity, defendant's culpability for the injury was "significantly" greater because of his specific knowledge of his condition and his failure to warn plaintiff of the imminent danger. *Id*. at 570-571. To support its holding that a defendant's culpability must be "significantly" more culpable than plaintiff's, despite the absence of that word in the exception articulated above in *Orzel*, the Court of Appeals in *Stopera* observed:

> "[T]his case involves a defendant who was significantly more culpable than the plaintiff. We consider this necessary for application of the culpability exception. In its discussion of the applicability of the exception, the *Orzel* Court listed only situations where a defendant was egregiously more at fault than a plaintiff [citation omitted] without suggesting that a slight difference in the degree of culpability would be sufficient for its application. Further, to apply the culpability exception in cases where a defendant is only slightly more blameworthy would likely eviscerate the wrongful conduct rule entirely; presumably, a plaintiff will almost always be

> able to argue that, if the allegations of a complaint are proved, a defendant's misconduct will be shown to be at least somewhat greater than the plaintiff's. Under our analysis, this would be insufficient to avoid summary disposition." *Id*. at 571 n 5.
>
> **Note:** In *Stopera*, the Court stated that defendant's culpability would not have been "significantly" greater than plaintiff's had defendant informed the plaintiff of his condition: "In the absence of the additional element present in this case, i.e., defendant's alleged failure to inform her of his HPV infection, plaintiff's action would be barred by the wrongful-conduct rule." *Id*. at 570 n 3.

Another exception to the wrongful conduct rule exists where the plaintiff alleges that the defendant violated a statute that specifically allows the plaintiff to recover for injuries suffered because of the violation. In *Orzel*, *supra* at 570, the Michigan Supreme Court discussed this exception:

> "The final relevant exception to the wrongful-conduct rule involves where the statute that the plaintiff alleges the defendant violated allows the plaintiff to recover for injuries suffered because of the violation. Statutes that permit certain classes of persons to recover do so either explicitly or implicitly. Where a statute explicitly authorizes persons similarly situated as the plaintiff to recover, then a problem does not arise, and the courts will simply permit the plaintiff to pursue his cause of action. Where the statute is silent regarding recovery, courts are left to infer whether the Legislature clearly intended persons similarly situated as the plaintiff to be entitled to seek recovery."

To determine whether a statute implies recovery for certain plaintiffs, the Supreme Court in *Orzel* quoted and relied upon 2 Restatement Torts, 2d, § 286, p 25, known as the "statutory purpose doctrine," which provides that:

> "'The court may adopt as the standard of conduct of a reasonable man the requirements of a legislative enactment or an administrative regulation whose purpose is found to be exclusively or in part
>
> "'(a) to protect a class of persons which includes the one whose interest is invaded, and
>
> "'(b) to protect the particular interest which is invaded, and
>
> "'(c) to protect that interest against the kind of harm which has resulted, and
>
> "'(d) to protect that interest against the particular hazard from which the harm results.'" Cited in *Orzel*, *supra* at 571.

D. Comparative Fault Defense

*However, see the next subsection for discussion of the "impairment" defense, MCL 600.2955a, which uses contributory negligence principles.

In Michigan, the comparative fault system has replaced the former contributory negligence system.* *Placek v City of Sterling Heights*, 405 Mich 638, 650 (1979). Thus, a plaintiff's (or injured person's) fault in causing the injury no longer automatically bars recovery of damages. MCL 600.2958. Instead, a person's civil liability under comparative fault is reduced through the apportionment of fault, which is as follows: if the trier of fact determines that the plaintiff is less than or equal to 50% at fault for the injury, the court must reduce the damages by the plaintiff's percentage of comparative fault. If

the trier of fact determines that the plaintiff is more than 50% at fault, the court must reduce the economic damages by the percentage of comparative fault, and it must reduce the noneconomic damages to $0. MCL 600.2959.

Michigan's comparative fault system, which applies in all actions based on tort or another legal theory seeking damages for personal injury, property damage, or wrongful death, apportions liability through the application of the following statutes: (1) MCL 600.2957, which provides for the determination and allocation of comparative fault between the parties; (2) MCL 600.2959, which provides for reduction of damages based upon comparative fault; and (3) MCL 600.6304, which provides for the determination and allocation of comparative fault in multiple plaintiff and defendant cases. These statutes are listed below.

MCL 600.2957 provides, in pertinent part:

> "(1) In an action based on tort or another legal theory seeking damages for personal injury, property damage, or wrongful death, the liability of each person shall be allocated under this section by the trier of fact and, subject to section 6304 [MCL 600.6304], in direct proportion to the person's percentage of fault. In assessing percentages of fault under this section, the trier of fact shall consider the fault of each person, regardless of whether the person is, or could have been, named as a party to the action."

MCL 600.2959 provides, in pertinent part:

> "In an action based on tort or another legal theory seeking damages for personal injury, property damage, or wrongful death, the court shall reduce the damages by the percentage of comparative fault of the person upon whose injury or death the damages are based as provided in section 6306 [MCL 600.6306, governing the determination of specific types of damages]. If that person's percentage of fault is greater than the aggregate fault of the other person or persons, whether or not parties to the action, the court shall reduce economic damages by the percentage of comparative fault of the person upon whose injury or death the damages are based as provided in section 6306 [MCL 600.6306, governing the determination of specific types of damages], and noneconomic damages shall not be awarded."

MCL 600.6304 provides, in pertinent part:

> "(1) In an action based on tort or another legal theory seeking damages for personal injury, property damage, or wrongful death involving fault of more than 1 person, including third-party defendants and nonparties, the court, unless otherwise agreed by all parties to the action, shall instruct the jury to answer special interrogatories or, if there is no jury, shall make findings indicating both of the following:
>
> "(a) The total amount of each plaintiff's damages.
>
> "(b) The percentage of the total fault of all persons that contributed to the death or injury, including each plaintiff
>
> . . . .

> "(2) In determining the percentages of fault under subsection (1)(b), the trier of fact shall consider both the nature of the conduct of each person at fault and the extent of the causal relation between the conduct and the damages claimed."

"Fault" is defined in MCL 600.6304(8) as "an act, an omission, conduct, including intentional conduct, a breach of warranty, or a breach of a legal duty, or any conduct that could give rise to the imposition of strict liability, that is a proximate cause of damage sustained by a party."

To first establish a plaintiff's comparative fault, a defendant must prove that the plaintiff's conduct was both a cause in fact and a legal, or proximate, cause of the damages. *Skinner v Square D Co*, 445 Mich 153, 162-163 (1994).

Michigan's comparative fault statutes do not distinguish between different types of at-fault conduct of the plaintiff or defendant. For example, a plaintiff's negligent at-fault conduct can be compared to a defendant's willful and wanton or even intentional misconduct. Accordingly, regardless of the type of fault by the plaintiff or defendant, damages will be reduced in proportion to the plaintiff's fault, if any, as long as the defendant proves that the plaintiff's conduct was both a factual and legal, or proximate, cause of the damages. *Lamp v Reynolds*, 249 Mich App 591, 599 (2002).

E. The "Impairment" Defense

*MCL 600.2955a does not specify whether the court or factfinder makes the fault determinations.

In personal injury, property damage, or wrongful death actions, it is an affirmative and absolute defense if, at the time of the injury, the plaintiff had an "impaired ability to function due to the influence of intoxicating liquor or a controlled substance," and, as a result of that impairment, was 50% or more at fault* for the accident or event. MCL 600.2955a(1). However, if the plaintiff in such circumstances was less than 50% at fault, the impairment defense is not absolute and the damage award should only be reduced by the plaintiff's percentage of fault.

MCL 600.2955a(1) provides, in pertinent part:

*See Section 3.12 for discussion on Michigan's drug-facilitated criminal sexual conduct crime, and Section 8.8 for drug facilitators generally.

> "It is an absolute defense in an action for the death of an individual or for injury to a person or property that the individual upon whose death or injury the action is based had an impaired ability to function due to the influence of intoxicating liquor or a controlled substance, and as a result of that impaired ability, the individual was 50% or more the cause of the accident or event that resulted in the death or injury. If the individual described in this subsection was less than 50% the cause of the accident or event, an award of damages shall be reduced by that percentage."*

An "impaired ability to function due to the influence of intoxicating liquor or controlled substance" means:

> "as a result of an individual drinking, ingesting, smoking, or otherwise consuming intoxicating liquor or a controlled substance, the individual's senses are impaired to the point that the ability to

> react is diminished from what it would be had the individual not consumed liquor or a controlled substance." MCL 600.2955a(2)(b).

MCL 600.2955a(2)(b) further provides that an individual is presumed to have an impaired ability to function due to the influence of intoxicating liquor or a controlled substance if a presumption of impairment would arise under the Motor Vehicle Code, at MCL 257.625a (operating a motor vehicle under the influence of intoxicating liquor or controlled substances).

Although the "impairment" defense under MCL 600.2955a does not expressly distinguish between voluntary or involuntary intoxication, the Court of Appeals has held that this defense cannot be applied where the defendant allegedly created or caused the condition of impairment in the injured person. In *Piccalo v Nix*, 246 Mich App 27 (2001), the plaintiff brought a negligence action alleging that, as a result of defendant's negligence in providing alcohol to her and other underage drinkers at a party hosted by defendant, she sustained a physical injury on her way home from the party when the van she was riding in left the road and crashed into a tree. The van was driven by another underage drinker. At trial, the defendant asserted the "impairment" defense, alleging that plaintiff had an impaired ability to function, and that this impairment caused plaintiff to be negligent or at fault because of her decision to accept the ride. The jury found no cause of action, based on a specific finding that plaintiff was 53% negligent or at fault (it also found defendant 19% at fault, and the driver 28%). On appeal, the Court of Appeals reversed and remanded for a new trial, finding it "absurd" to allow defendant to assert the "impairment" defense when she caused or created the impairment:

> "[T]he alleged negligence committed by defendant was the violation of state and local law in providing alcohol to minors. Specifically, plaintiff presented evidence, if deemed credible, that defendant made alcohol accessible to minors, knew that minors were consuming the alcohol, learned through the police of the impairment of an underage drinker, [the driver], and failed to take adequate measures to prevent further inebriation. Accordingly, defendant seeks to benefit from the impairment defense when the alleged negligence was providing the means of impairment to underage minors. While the statute itself provides that the defense of impairment is 'absolute' and applies 'in an action for the death of an individual or for injury to a person or property,' we decline to apply the statute in this personal injury action where defendant allegedly created the condition of impairment of both driver . . . and plaintiff as well as other party attendees. It would be absurd to allow the defense of impairment to an individual who caused or created the impairment of the injured person." . . . Accordingly, defendant's contention that the statute applies in the present case is without merit." *Id*. at 34-35. [Citations omitted.]

Although MCL 600.2955a applies contributory negligence principles to *bar* recovery by intoxicated plaintiffs who are 50% or more at fault, and applies comparative fault principles to *reduce* recovery by intoxicated plaintiffs who are less than 50% at fault, application of the statute (and jury instructions based on the statute) is not arbitrary and capricious and does not violate due process as guaranteed by the US Const, Am XIV and Const 1963, art 1, § 17. See *Wysocki v Felt*, 248 Mich App 346, 361 (2001), where the Court of

Appeals affirmed a jury verdict of no cause of action in a negligence and premises liability action seeking damages for injuries sustained after the plaintiff, while intoxicated, broke through a home deck railing and fell. The Court of Appeals in *Wysocki* also held that MCL 600.2955a (and jury instructions based on the statute) does not violate equal protection as guaranteed by US Const, Am XIV and Const 1963, art 1, § 2. *Wysocki*, at 369. Finally, the Court of Appeals held that defendant was not deprived of his right to jury trial when the jury was prevented from deciding further issues of fault and damages after it determined defendant to be 50% or more the cause of his injuries. *Id*. at 371-372.

10.4 Evidentiary Issues

A. Rape Shield Laws Inapplicable in Civil Actions

*See Section 7.2 for more information on Michigan's rape shield laws.

Michigan's rape shield laws, MCL 750.520j(1) and MRE 404(a)(3), are limited in application to criminal sexual conduct cases only, and do not apply to civil actions. See the qualifying language in MCL 750.520j(1) ("Evidence of . . . the victim's sexual conduct . . . shall not be admitted under sections 520b to 520g [CSC I, CSC II, CSC III, CSC IV, assault with intent to commit CSC] . . ."), and in MRE 404(a) and (a)(3) ("Evidence of a person's character or a trait of character is not admissible . . . except: In a prosecution for criminal sexual conduct, evidence of the alleged victim's past sexual conduct with the defendant and evidence of specific instances of sexual activity showing the source or origin of semen, pregnancy, or disease").*

Although Federal Rule of Evidence 412 provides rape shield protection for alleged sexual assault victims in federal civil suits, no comparable statute or rule exists in Michigan. As of this Benchbook's publication date, neither the Michigan Legislature nor the Michigan Supreme Court has decided to emulate or adopt FRE 412 by statute or rule of evidence.

B. Cross-Examination Regarding Victim's Civil Suit

Because it is always relevant to credibility, a witness may be cross-examined as to whether he or she has filed, or is contemplating filing, a civil lawsuit that may be affected by the outcome of the criminal case. *People v Morton*, 213 Mich App 331, 334-335 (1995). In fact, "[i]t is reversible error for a trial court to refuse to allow inquiry and argument regarding a civil action which has been commenced with respect to the same matter as the criminal action being tried, since the bias or interest of a witness is a proper subject of inquiry." *People v Grisham*, 125 Mich App 280, 285 (1983).

C. Asserting the Privilege Against Self-Incrimination in Civil Suits

Both the state and federal constitutions prohibit compelled self-incrimination. See US Const, Am V (no person "shall be compelled in any criminal case to be a witness against himself"); and Const 1963, art 1, § 17 ("[n]o person shall

be compelled in any criminal case to be a witness against himself"). See also *In re Gault*, 387 US 1, 55 (1967) (privilege against self-incrimination applies to juvenile delinquency proceedings); and MCR 5.935(B)(4)(c) (privilege against self-incrimination applied to juvenile delinquency proceedings in Michigan). Despite its reference to criminal proceedings, US Const, Am V, "not only permits a person to refuse to testify against himself at a criminal trial in which he is a defendant, but also 'privileges him not to answer official questions put to him in any other proceeding, civil or criminal, formal or informal, where the answers might incriminate him in future criminal proceedings.'" *People v Wyngaard*, 462 Mich 659, 671-672 (2000), quoting *Minnesota v Murphy*, 465 US 420, 426 (1984).

However, the application of the privilege against self-incrimination to civil proceedings does not allow a witness in a civil suit to refuse to testify at all. MCL 600.2154 sets forth this limitation on the application of the privilege against self-incrimination for purposes of civil suits:

> "Any competent witness in a cause shall not be excused from answering a question relevant to the matter in issue, on the ground merely that the answer to such question may establish, or tend to establish, that such witness owes a debt, or is otherwise subject to a civil suit; but this provision shall not be construed to require a witness to give any answer which will have a tendency to accuse himself of any crime or misdemeanor, or to expose him to any penalty or forfeiture, nor in any respect to vary or alter any other rule respecting the examination of witnesses."

A witness in a civil suit must take the stand when called as a witness and may not invoke the privilege "'until testimony sought to be elicited will in fact tend to incriminate.'" *People v Ferency*, 133 Mich App 526, 533-534 (1984), quoting *Brown v United States*, 356 US 148, 155 (1958). The trial judge must determine whether the witness's answer may have a tendency to incriminate him or her before ordering the witness to respond. *Ferency*, *supra* at 534.

1. Drawing Adverse Inferences From Assertion of the Privilege

The Fifth Amendment to the United States Constitution does not forbid the drawing of adverse inferences against parties to civil suits who refuse to testify. See *Baxter v Palmigiano*, 425 US 308, 318 (1976) (unlike in a criminal trial, plaintiff's attorney may comment on the defendant's refusal to respond to a question); *Phillips v Deihm*, 213 Mich App 389, 400 (1995) (summary judgment was proper against a defendant in a civil suit alleging sexual abuse where defendant refused to set forth specific facts showing a genuine issue of fact for trial); and *Albert v Chambers*, 335 Mich 111, 114 (1952) (facts not denied by the defendant were properly deemed admitted, despite the fact that the defendant may have been subject to criminal liability based on such admissions).

2. Remedies to Protect Defendant's or Juvenile's Privilege Against Self-Incrimination

To protect a defendant's or juvenile's privilege against self-incrimination, courts may stay civil proceedings pending the outcome of criminal or juvenile delinquency proceedings. A court has inherent authority to stay a proceeding pending the outcome of a separate action even though the parties to both proceedings are not the same. *Landis v North American Co*, 299 US 248, 254-255 (1936). In addition, courts may enter protective orders regarding material sought during discovery. See MCR 2.302(B)(1) (privileged material not discoverable) and 2.302(C) (a court "may issue any order that justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense . . .").

In *Massey v City of Ferndale*, 206 Mich App 698, 700-701 (1994), two plaintiffs filed a civil suit alleging false arrest and other torts, and one of the plaintiffs was criminally charged with carrying a concealed weapon. Both plaintiffs refused to participate in discovery in their civil suit, asserting their privilege against self-incrimination. The trial court stayed proceedings in the civil suit but ultimately dismissed the suit without prejudice for the plaintiffs' failure to permit discovery, despite the fact that the criminal case was being appealed. The Court of Appeals upheld the sanction of dismissal without prejudice, finding that the trial court protected the plaintiffs' Fifth Amendment rights by issuing the stay until trial proceedings in the criminal case were concluded. The Court of Appeals also found the sanction of dismissal without prejudice did not constitute a substantial penalty for the plaintiffs' exercise of their privilege against self-incrimination. *Id.* at 702-703.

In *In re Stricklin*, 148 Mich App 659, 663-666 (1986), the Court of Appeals reviewed the trial court's refusal to adjourn a civil child protective proceeding during the pendency of concurrent criminal proceedings based on the same alleged conduct and found no violation of the parents' privilege against compelled self-incrimination under US Const, Am V, and Const 1963, art 1, § 17. The parents did not testify during the civil proceeding and were eventually convicted following a criminal proceeding. The issue was "whether a penalty was exacted" for their refusal to testify "sufficient to amount to the kind of compulsion contemplated by the Fifth Amendment." *Id.* at 664. The Court of Appeals held that the purported penalty—the increased risk of loss of parental rights by refusing to testify during the protective proceeding—did not amount to compulsion prohibited by the state and federal constitutions. The parents' increased risk of loss of their parental rights implied that they would present nonincriminating testimony during the civil proceedings, making their choice not to give nonincriminating testimony a matter of trial strategy, not a matter of protecting their constitutional rights. *Id.* at 665.

D. Prohibition Against Use of Evidence From Juvenile Delinquency Proceedings

A provision of the Juvenile Code restricts the use of evidence taken during juvenile delinquency cases in subsequent proceedings. MCL 712A.23 provides:

> "Evidence regarding the disposition of a juvenile under [the Juvenile Code] and evidence obtained in a dispositional proceeding under [the Juvenile Code] shall not be used against that juvenile for any purpose in any judicial proceeding except in a subsequent case against that juvenile under [the Juvenile Code]. This section does not apply to a criminal conviction under [the Juvenile Code]."

This statute is intended to proscribe the subsequent use of testimony taken at a juvenile delinquency proceeding; it is not intended to proscribe the subsequent use of physical evidence. In *People v Hammond*, 27 Mich App 490, 494 (1970), the defendant argued on appeal that the physical evidence used by the prosecutor—photographs and cans of duplicating fluid—at his arson and attempted robbery trial was inadmissible under MCL 712A.23 because it had been previously offered as evidence during both waiver hearings in juvenile court. In finding such physical evidence not barred under MCL 712A.23, the Court of Appeals held as follows:

> "It is our conclusion that the intent of the statute is to proscribe the actual testimony taken at the juvenile proceedings. It is not meant to preclude the physical evidence, nor is it meant to exclude a witness who testified at the juvenile proceedings from testifying on the same subject matter at a subsequent trial for the same offense. What is forbidden is the use of testimonial evidence from the juvenile hearing either as substantive evidence or to impeach at a subsequent trial." *Hammond*, *supra* at 494.

Thus, although testimony taken during a delinquency proceeding is inadmissible in a subsequent proceeding, an order of adjudication from a delinquency proceeding is admissible in a subsequent civil proceeding.

The prohibition contained in MCL 712A.23 does not apply to designated proceedings.* The conviction of a juvenile following designated proceedings has "the same effect and liabilities as if it had been obtained in a court of general criminal jurisdiction." MCL 712A.2d(7).

*See Miller, *Crime Victim Rights Manual*, (MJI, 2001), Section 3.2(H), for a description of designated proceedings.

10.5 Damages and Remedies

A. Money Damages Recoverable in Civil Actions

In Michigan, it is well-established that generally only compensatory damages are available to a person injured through the legally culpable acts of another. *McAuley v General Motors Corp*, 457 Mich 513, 519-520 (1998). The purpose of compensatory damages "is to make the injured party whole for the losses actually suffered." *Id.* at 520. Consequently, "the amount of recovery

for such damages is inherently limited by the amount of the loss; the party may not make a profit or obtain more than one recovery." *Id*.

*Statutory exceptions exist, such as MCL 15.240(7) (Freedom of Information Act); MCL 600.2911(2)(b) (libel or slander); and MCL 750.539h(c) (eavesdropping).

In general, punitive damages are not available in Michigan.* *Kewin v Massachusetts Mutual Life Ins Co*, 409 Mich 401 (1980). However, in lieu of punitive damages, a plaintiff may seek an award of exemplary damages—recoverable as compensation to the plaintiff, not as punishment to the defendant—for injured feelings. Exemplary damages are recoverable when "the defendant commits a voluntary act which inspires feelings of humiliation, outrage, and indignity. The conduct must be malicious or so wilful and wanton as to demonstrate a reckless disregard of the plaintiff's rights." *Jackson Printing Co v Mitan*, 169 Mich App 334, 341 (1988). Some statutes expressly provide for exemplary damages. See, e.g., MCL 600.2954 (civil action for stalking) and MCL 600.2911(2)(b) (libel or slander). Because of the requirement that the conduct must be malicious, wilful, or wanton, exemplary damages are not available in negligence actions. *Veselenak v Smith*, 414 Mich 567, 575 (1982). Exemplary damages should also not be awarded when compensatory damages make the party whole. *Jackson Printing*, *supra* at 341.

The following is a non-exhaustive list of compensatory damages potentially available to sexual assault victims:

1. Economic Damages

- Lost wages and impaired earning capacity (past, present, and future), *Peterson v Dep't of Transportation*, 154 Mich App 790, 802-803 (1986); M Civ JI 50.06-50.07.
- Medical expenses (past, present, and future), M Civ JI 50.05.
- Miscellaneous expenses, such as caretaking, substitute transportation, babysitting, etc. (past, present, and future), M Civ JI 50.08.

2. Non-Economic Damages

- Pain and suffering (past, present, and future), M Civ JI 50.02.
  - physical pain and suffering.
  - mental anguish.
  - fright and shock.
  - denial of social pleasure and enjoyments.
  - embarrassment, humiliation or mortification.
- Disability and disfigurement, M Civ JI 50.03.
- Aggravation of pre-existing ailment or condition, M Civ JI 50.04.

Note: A related type of damages that may apply in civil actions is derivative damages. Derivative damages are those suffered by others,

e.g., a spouse or a child, as a result of the personal injury. These damages include claims by spouses, M Civ JI 52.01, which were known at common-law as "loss of consortium," and claims by other family members, like children of the injured parent, M Civ JI 52.02.

B. Required Set Off of Compensatory Damages Against Restitution

A restitution order entered in a criminal case does not act as a bar to the recovery of damages in a civil action arising out of the same incident. *Aetna Casualty & Surety Co v Collins*, 143 Mich App 661, 663 (1985). However, any award of compensatory damages in a civil suit must be reduced by the amount of restitution received by the victim. MCL 780.766(9), MCL 780.794(9), and MCL 780.826(9) state in relevant part:

> "Any amount paid to a victim or victim's estate under an order of restitution shall be set off against any amount later recovered *as compensatory damages* by the victim or the victim's estate in any federal or state civil proceeding . . . ." [Emphasis added.]

Because the foregoing quoted language applies only to compensatory damages, any amount of exemplary damages awarded to a victim in a civil suit is not reduced by the amount of restitution ordered in a criminal case.

C. Liability of Multiple Perpetrators

Liability of multiple perpetrators is generally governed by the laws of "several" liability. In Michigan, subject to the exceptions enumerated below, "joint and several" liability has been abolished and replaced with "several" liability.* MCL 600.2956. "Several" liability is based on a defendant's degree of culpability, making "each defendant . . . responsible for paying only that percentage of the judgment for which the trier of fact finds the defendant to be at fault." *Michigan Civil Procedure* (ICLE, 1999), Vol 2, p 20-18. Thus, unless "joint and several" liability applies by virtue of an exception to MCL 600.2956, the liability of each defendant in a civil action for personal injury, property damage, or wrongful death will be "several" and determined by the factfinder and allocated "in direct proportion to the [defendant's] percentage of fault." MCL 600.2957(1).

*1995 PA 161, effective March 28, 1996.

"Joint and several" liability, which allows a plaintiff to "collect the entire amount of the judgment against any defendant and make that defendant seek contribution from codefendants to pay their share of the judgment,"* will only apply if:

*_Michigan Civil Procedure_ (ICLE, 1999), Vol 2, p 20-18.

- The action includes a medical malpractice claim, MCL 600.6304(6); or
- The act or omission that causes the personal injury, property damage, or wrongful death is one of the following:
  - A crime, an element of which is gross negligence, for which the defendant was convicted, MCL 600.6312(a).

– A crime involving the use of alcohol or a controlled substance for which the defendant was convicted that violates one or more of the enumerated laws under MCL 600.6312(b), some of which include: handling explosives under the influence, MCL 29.54; possession or use of firearm under the influence, MCL 750.237; and operating a vehicle under the influence, MCL 257.625.

10.6 Concurrent Criminal and Civil Proceedings

A. The Outcome of Criminal or Juvenile Proceedings Does Not Bar a Subsequent Civil Action by a Crime Victim

1. Effect of Acquittal

Because the standard of proof is lower in civil cases than in criminal cases, an acquittal on criminal charges does not bar a subsequent civil suit based on the same conduct. *Helvering v Mitchell*, 303 US 391, 397 (1938). In most civil actions, the plaintiff must prove all elements of a claim by a preponderance of the evidence. See M Civ JI 8.01 (plaintiff must prove his or her claim with "evidence which outweighs the evidence against it"). In criminal and juvenile delinquency proceedings, the prosecuting attorney must prove each element of a charged offense beyond a reasonable doubt. *Mullaney v Wilbur*, 421 US 684 (1975), *In re Winship*, 397 US 358, 366-368 (1970), and MCR 5.942(C).

2. Effect of Conviction or Adjudication

A conviction or adjudication in criminal or juvenile proceedings does not prevent a crime victim from filing a civil suit based upon the same conduct. The Double Jeopardy Clauses of the state and federal constitutions prohibit multiple convictions or punishments for the same offense. US Const, Am V, and Const 1963, art 1, § 15. See also *Breed v Jones*, 421 US 519, 531 (1975) (jeopardy attaches during juvenile delinquency proceedings). However, "[t]he protections of the Double Jeopardy Clause are not triggered by litigation between private parties." *United States v Halper*, 490 US 435, 451 (1989), overruled on other grounds *Hudson v United States*, 522 US 93 (1997) ("nothing in today's opinion precludes a private party from filing a civil suit seeking damages for conduct that previously was the subject of criminal prosecution and punishment").

> **Note:** The outcome of a prior civil proceeding ordinarily does not affect a prosecuting attorney's ability to file a subsequent criminal action. The Michigan Supreme Court has held that a jury verdict of "no jurisdiction" in a civil child protective proceeding does not bar a subsequent criminal prosecution based on the same conduct. *People v Gates*, 434 Mich 146, 163 (1990).

A criminal defendant or juvenile who has only been convicted or adjudicated for one offense may apply to set aside or "expunge" his or her sole conviction or adjudication.* If the court grants the application and sets aside the conviction or adjudication of the applicant, the applicant shall be considered

*See Section 9.8 for further discussion of setting aside convictions.

never to have been convicted or adjudicated for the offense. However, expungement does not affect a victim's right to initiate or defend a civil action for damages. MCL 780.622(5) and MCL 712A.18e(11)(c).

B. The Victim's Use of Judgments or Orders From Criminal or Juvenile Proceedings as Evidence in Civil Actions

To establish perpetrator liability, a sexual assault victim may in a subsequent civil suit seek admission of a criminal conviction (or order of adjudication) obtained by verdict or plea from a prior criminal or juvenile case.* The admissibility of such evidence to prove essential facts in subsequent civil suits depends on the causes of action in which it is offered. Many criminal convictions do not equate to or mirror subsequent civil causes of action. The admissibility of such evidence often depends on the interplay of MCL 600.2106, MRE 803(22), MRE 410, MRE 404, MRE 403, and case law, along with the doctrines of collateral and equitable estoppel.

*In cases under the juvenile article of the Crime Victim's Rights Act (CVRA), a victim is entitled to a certified copy of the adjudicative order to recover under the "parental liability statute." See Section 10.2(B).

MCL 600.2106 provides:

> "A copy of any order, judgment or decree, of any court of record in this state, duly authenticated by the certificate of the judge, clerk or register of such court, under the seal thereof, *shall be admissible in evidence in any court in this state, and shall be prima facie evidence of the jurisdiction of said court over the parties to such proceedings and of all facts recited therein*, and of the regularity of all proceedings prior to, and including the making of such order, judgment or decree." [Emphasis added.]

MRE 803(22) allows admission of a judgment of conviction of a felony or two-year misdemeanor as substantive evidence of conduct at issue in a subsequent civil case. MRE 803(22) provides:

> "Evidence of a final judgment, entered after a trial or upon a plea of guilty (or upon a plea of nolo contendere if evidence of the plea is not excluded by MRE 410),* adjudging a person guilty of a crime punishable by death or imprisonment in excess of one year, [is admissible] to prove any fact essential to sustain the judgment, but not including, when offered by the state in a criminal prosecution for purposes other than impeachment, judgments against persons other than the accused. The pendency of an appeal may be shown but does not affect admissibility."

*MRE 410 is discussed further below.

> **Note:** By its terms, MRE 803(22) is limited to convictions and does not extend the hearsay exception to judgments of acquittal.

Thus, if the defendant was convicted by plea, judge, or jury of a felony or two-year misdemeanor, MRE 803(22) allows the judgment to be used as evidence to prove that the defendant committed the acts that led to the previous conviction. Although evidence of a misdemeanor conviction (one year or less) is inadmissible under MRE 803(22), evidence of a *plea* to a misdemeanor offense other than a motor vehicle violation would be admissible under MRE 801(d)(2)(a) as an admission by a party-opponent.

MRE 803(22) must be read in conjunction with MRE 410, which limits the use of pleas and plea-related statements. Under MRE 410(1)-(4), the following evidence is not admissible in a civil or criminal proceeding against a defendant who made a plea or participated in plea discussions:

> "(1) A plea of guilty which was later withdrawn;
>
> "(2) A plea of nolo contendere, except that, to the extent that evidence of a guilty plea would be admissible, evidence of a plea of nolo contendere to a criminal charge may be admitted in a civil proceeding to support a defense against a claim asserted by the person who entered the plea;
>
> **Note:** In *Lichon v American Universal Ins Co*, 435 Mich 408, 415 (1990), the Michigan Supreme Court held that a nolo contendere plea was not an admission of guilt that could be used in a subsequent civil proceeding against the defendant who entered the plea. However, the rule set forth in *Lichon* was later modified by MRE 410(2), which allows the use of evidence of such a plea to support a defense against a claim by the person who entered the plea.
>
> "(3) Any statement made in the course of any proceedings under MCR 6.302* or comparable state or federal procedure regarding either of the foregoing pleas; or
>
> "(4) Any statement made in the course of plea discussions with an attorney for the prosecuting authority which do not result in a plea of guilty or which result in a plea of guilty later withdrawn."

*MCR 6.302 addresses the requirements for guilty and nolo contendere pleas.

However, such statements are admissible in a subsequent civil proceeding if "another statement made in the course of the same plea or plea discussions has been introduced and the statement ought in fairness be considered contemporaneously with it . . . ." MRE 410.

Despite the foregoing statutes and rules that allow for the substantive use of a defendant's prior conviction in a subsequent civil suit, the Michigan Supreme Court has held such evidence inadmissible. Before the adoption of the Michigan Rules of Evidence in 1985, the Michigan Supreme Court, in *Wheelock v Eyl*, 393 Mich 74, 79 (1974), decided a case involving an automobile negligence action where the plaintiff sought to admit evidence that the defendant previously received a traffic ticket (and paid a fine) for the same accident at issue. In holding that evidence of payment of a fine is inadmissible as substantive evidence in a subsequent civil suit, the Court expressly extended its holding to criminal convictions: "a criminal conviction after trial, or plea, or payment of fine is not admissible as substantive evidence of conduct at issue in a civil case arising out of the same occurrence." *Id*. at 79.

In *Lichon*, *supra*, a 1990 case involving the admissibility of a nolo contendere plea in a subsequent civil action, the Michigan Supreme Court recognized its holding in *Wheelock*, stating the following regarding criminal convictions: "We express no opinion regarding whether a criminal conviction, based upon a jury verdict, may be given preclusive effect . . . . We make no ruling as to the preclusive effect of a conviction based upon a guilty plea." *Id*. at 431.

[Citations omitted.] The Court also stated, in footnote 20: "The question of the effect of a guilty plea and a conviction based thereon raises issues of both collateral estoppel and equitable estoppel. See 1 Restatement Judgments, 2d, § 27, comment e, pp 256-257." Although *Wheelock* was decided before the adoption of the Rules of Evidence in 1985, *Lichon* was decided five years after their adoption.

The related doctrines of collateral estoppel and equitable estoppel are distinquished as follows:

- **Collateral Estoppel** bars relitigation of factual issues that already have been decided in a prior action.* It operates where the subsequent action is based upon a different cause of action from that upon which the prior action was based. For this doctrine to apply, there must be a question of fact essential to the judgment that was actually litigated and determined by a valid and final judgment. *Nummer v Treasury Dep't*, 448 Mich 534, 542 (1995). Additionally, the parties must have had a full opportunity to litigate the issue, and there must be mutuality of estoppel. *Id.* Guilty pleas and no contest pleas in criminal cases are not the equivalent of a legal trial and thus do not satisfy the "actually litigated" requirement. See *Lichon*, *supra* at 429-430. The prior judgment is conclusive between the parties to it as to questions actually litigated and determined by the judgment. It is not conclusive as to questions which might have been but were not litigated in the original action. *McCoy v Cooke*, 165 Mich App 662, 667 (1988). "Mutuality of estoppel" means "that in order for a party to estop an adversary from relitigating an issue that party must also have been a party, or a privy to a party, in the previous action." *Lichon*, *supra* at 427. Putting it another way, "'[t]he estoppel is mutual if the one taking advantage of the earlier adjudication would have been bound by it, had it gone against him.'" *Howell v Vito's Trucking & Excavating Co*, 386 Mich 37, 43 (1971).

  *Res judicata precludes relitigation of the same *claim* in a subsequent action. *McCoy v Cooke*, 165 Mich App 662, 666 (1988).

- **Equitable Estoppel** is a doctrine that precludes a party from asserting or denying the existence of a particular fact. *Conagra, Inc v Farmers Bank*, 237 Mich App 109, 140-141 (1999). The doctrine enables a party to avoid litigating, in a second proceeding, claims which are plainly inconsistent with those litigated in a prior proceeding. *Lichon, supra* at 416. The doctrine arises when: "(1) a party, by representations, admissions, or silence intentionally or negligently induces another party to believe facts, (2) the other party justifiably relies and acts on that belief, and (3) the other party is prejudiced if the first party is allowed to deny the existence of those facts." *Conagra*, *supra* at 141. To ensure fair dealing between the parties, courts will apply the doctrine only "if the party asserting the estoppel was a party in the prior proceeding and if that party has detrimentally relied upon [the] opponent's prior position." *Lichon, supra* at 416.

MRE 403 allows a court to exclude relevant evidence if its probative value is substantially outweighed by the danger of unfair prejudice. The application of MRE 403 might be necessary because the admission of evidence of a criminal conviction in a subsequent civil suit might be viewed as excessively persuasive and therefore unfairly prejudicial.

MRE 404(b) prohibits admission of evidence of other crimes, wrongs, or acts to prove a defendant's character and his or her actions in conformity therewith. The application of MRE 404(b) might be necessary because the admission of evidence of a criminal conviction in a subsequent civil suit might be viewed as running afoul of the impermissible inference that defendant acted in conformity with his "bad character."

10.7 Crime Victim Services Commission

Under the Crime Victims Compensation Act, MCL 18.351 et seq., administered through the Crime Victim Services Commission ("CVSC"), a sexual assault victim may seek reimbursement for eligible "out-of-pocket" expenses for a "personal physical injury." A "personal physical injury" means actual bodily harm and includes pregnancy. MCL 18.351(1)(f). "Out-of-pocket" expenses include medical care, psychological counseling,* replacement services (child care, transportation, homemaking tasks, etc.), nonmedical religious healing, and other necessary services. MCL 18.351(1)(e). Funeral expenses are also covered. MCL 18.361(3). However, losses related to personal property, pain, suffering, inconvenience, physical impairment, or other nonpecuniary damage are not reimbursable by the CVSC. 1979 AC, R 18.356(1)-(2).

* Psychological counseling is reimbursable up to a maximum of 26 hours for individual sessions and eight hours for family sessions, at $80/hour (counselors and therapists) or $95/hour (psychologists or physicians). MCL 18.361(4).

> **Note:** Under pending legislation, health care providers would be eligible to seek compensation for the costs of administering sexual assault evidence kits, venereal disease tests, and pregnancy tests. This would change the current procedure, which makes victims pay health care providers for the costs of administering these kits and tests (or by submitting an insurance claim) and reimbursing the victims later, if they meet eligibility requirements. Under the pending legislation, a victim would not be responsible for paying these costs and would also not be required to submit an insurance claim before a health care provider is reimbursed. See Senate Bill 552.

A. Eligibility Requirements

To be eligible for an award, the claimant must suffer a minimum out-of-pocket loss of $200.00 or at least two continuous weeks of lost earnings or support. MCL 18.354(3). However, the CVSC may waive these limitations if the claimant is "retired by reason of age or disability" or is "a victim of criminal sexual conduct in the first, second, or third degree." *Id.*

B. Maximum Award Limits, Emergency Awards, and Required Set-Offs

An aggregate award shall not exceed $15,000.00 per claimant. MCL 18.361(1). All claims arising from the death of an individual must be considered together, and the total compensation awarded for such claims must not exceed $15,000.00. MCL 18.356(1).

A claimant may seek immediate payment of an "emergency award," up to $500.00, "[i]f it appears that . . . an award probably will be made and undue hardship will result to the claimant if immediate payment is not made." MCL 18.359. Unless the emergency award exceeds the final award, the amount of the emergency award must be deducted from the final award. *Id.* If the emergency award exceeds the final award, the claimant must repay the excess to the CVSC. *Id.*

The amount of all CVSC awards must be reduced by any payments made to the victim from the perpetrator, insurance companies, public funds, or from an emergency award under MCL 18.359. MCL 18.361(5)(a)-(d). This includes restitution. A court must not order restitution to the crime victim "if the [crime] victim or victim's estate has received or is to receive compensation" for a loss from another source, such as an insurance company or the CVSC. In such cases, the court must order restitution to be paid to the insurance company or the CVSC. See MCL 780.766(8); MCL 780.794(8); and MCL 780.826(8). In the event the court orders restitution directly to the crime victim, and the crime victim later receives an award from the CVSC, the award from the CVSC must be reduced by the amount of the restitution received by the crime victim. See MCL 780.766(9); MCL 780.794(9); MCL 780.826(9); and MCL 18.361(5)(a).

C. Filing Requirements

A claimant must report the crime to the proper authorities within 48 hours after its occurrence. MCL 18.360(c). However, a claimant who does not report the crime to the proper authorities within the 48-hour time limit may still be eligible for an award if the commission finds either of the following:

> "(*i*) The crime was criminal sexual conduct committed against a victim who was less than 18 years of age at the time of the occurrence and the crime was reported before the victim attained 19 years of age.
>
> "(*ii*) The commission, for good cause shown, finds the delay was justified." MCL 18.360(c)(*i*)-(*ii*).

A claim must be filed within one year after the occurrence of the crime upon which the claim is based.* MCL 18.355(2). However, MCL 18.355(2)(a)-(b) contain two exceptions that deal with sexual assaults against minors and with the delayed discovery that injuries were caused by criminal misconduct. Those exceptions are as follows:

> "(a) If police records show that a victim of criminal sexual conduct in the first, second, or third degree was less than 18 years of age at the time of the occurrence and that the victim reported the crime before attaining 19 years of age, a claim based on that crime may be filed not later than one year after the crime was reported.
>
> "(b) A claim may be filed within 1 year after the discovery by a law enforcement agency that injuries previously determined to be accidental, of unknown origin, or resulting from natural causes, were incurred as the result of a crime." *Id.*

*An approved filing form, with instructions, is available on-line at http://www.mdch.state.mi.us/cv/Dch-0560.pdf (last visited July 25, 2002).

Note: The CVSC may, upon petition by the claimant and for good cause shown, extend the filing period. MCL 18.355(3). Good cause may be found where late filing is a result of physical or emotional incapacity that is reasonably associated with the victim's injury, where the victim did not receive information concerning the deadline from authorities responsible for providing it under the Crime Victim's Rights Act, or where the victim has received inaccurate or incomplete information from a figure of authority from whom a reasonable person would be confident in receiving information in that situation. Good cause may also include situations where a claimant has made a conscious decision, based on known facts, not to seek assistance from the state, and where the claimant later discovers that either the injury or loss from the injury is far more substantial than known earlier. Justification can include newly discovered medical facts or the discovery that other reasonably expected sources of reimbursement are not available.

D. CVSC Investigation Procedures

After accepting a claim for filing, the CVSC must conduct an investigation and examination to determine the claim's validity. Under MCL 18.356(1), the investigation shall include an examination of the following:

- Papers filed in support of the claim.
- Official records and reports concerning the crime.*
- Medical and hospital reports relating to the injury upon which the claim is based.

*Under proposed legislation, sexual assault victims would not be required to file a police report with the CVSC as a condition of the CVSC reimbursing health care providers for the costs of sexual assault evidence kits, venereal disease tests, and pregnancy tests. See SB 552.

Additionally, the CVSC has authority to require medical examinations of victims and to "[t]ake or cause to be taken affidavits or depositions within or without the state." MCL 18.353(1)(d). Investigations and determinations of claims are typically conducted by a member of the commission's staff, known as a "claims specialist." See MCL 18.353(2) (the commission may delegate functions other than conducting reviews or hearings to a staff member).

Through its investigation, the commission must verify certain facts before it makes any award to a claimant. MCL 18.360(a)-(d) require the commission to verify the following facts:

> "(a) A crime was committed.
>
> "(b) The crime directly resulted in personal physical injury to, or death of, the victim.
>
> "(c) Police records show that the crime was reported promptly to the proper authorities. An award may not be made where the police records show that the report was made more than 48 hours after the occurrence of the crime unless either of the following apply:
>
> > "(*i*) The crime was criminal sexual conduct committed against a victim who was less than 18 years of age at the time of the occurrence and the crime was reported before the victim attained 19 years of age.

> "(*ii*) The commission, for good cause shown, finds the delay was justified.
>
> "(d) That the crime did not occur while the victim was confined in a federal, state, or local correctional facility."

When a claim cannot be verified, the commission must give written notice of particular deficiencies to the claimant. If the claimant does not supply the requested information within a reasonable period of time, the claim must be denied in whole or in part as appropriate. 1979 AC, R 18.355(2).

Further discussion of the Crime Victims Compensation Act and the CVSC is outside the scope of this Benchbook. For more information on either the Act or the CVSC, see Miller, *Crime Victim Rights Manual* (MJI, 2001), Chapter 11.